

Claimant contends Judge Moore erred. Claimant alleges he reinjured his back either on or about January 3, 2002, or by a series of events through his last day of working for respondent on January 15 or 18, 2002. He also argues he has presented new

evidence that establishes he did not injure his back after January 3, 2002, while working on his van. Accordingly, claimant argues the Judge did not properly consider his alleged progressively worsening back condition in late 2001 through his last day of work in mid-January 2002. Consequently, claimant requests the Board to reverse the April 13, 2004 Order and grant him preliminary hearing benefits.

Conversely, respondent and its insurance carrier (respondent) request the Board to affirm the April 13, 2004 Order. They argue the Board does not have jurisdiction to review the April 13, 2004 Preliminary Hearing Order as the second preliminary hearing was more in the nature of a motion to reconsider the Board's February 6, 2003 Order rather than being a preliminary hearing to consider newly discovered evidence. Respondent also requests this appeal be assigned to Board Member Duncan A. Whittier as he is the Board Member who reviewed the initial October 22, 2002 preliminary hearing Order entered in this claim. Finally, respondent argues the new evidence claimant presented at the April 2004 hearing fails to satisfy claimant's burden of proof.

The only issue before the Board on this appeal is whether claimant has established his present need for medical treatment is due to an injury he sustained at work in January 2002.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant, who was working for respondent despite an earlier back injury, ongoing back symptoms and medical restrictions, requests preliminary hearing benefits for an alleged January 2002 back injury. In his brief to the Board, claimant offered the following summary:

The nature of injury in this cause of action is, in some respects, complex. This injury is pled as arising on or about January 3, 2002, and each and every day worked thereafter. From the evidence presented herein, we have a claimant who had a pre-existing back condition with restrictions. Within the month before the January 3, 2002 aggravation, the claimant's restrictions were increased by a physician. The employer, noting attendance problems related to the back condition made a change of assignment to the claimant to, hopefully, diminish the wear a[nd] tear on Claimant's back and lessen attendance problems. Claimant's testimony reflects that his work was aggravating his condition, his stocking work was giving him problems at work, and when he was moved to maintenance, aspects of the maintenance position still gave him problems. It is clear that the claimant, based upon the nature of his employment, being a third shift employee working as a stocker or in maintenance, on numerous occasions had to be allowed to leave early

because of exacerbation of back pain. Claimant indicated that his condition had gotten worse in the last months of 2001, and then the Claimant reported that he exacerbated the back significantly on January 3, 2002. This injury largely is a pre-existing condition that has gotten worse over a period of time. The incident on January 3 worsened the claimant's back, but it did not worsen the claimant's back condition to the point that he believed he would not ultimately improve after some rest. . . . The claimant would submit that the nature of this injury is, for the most part, a series of injuries with a more acute exacerbation on January 3, 2002 through the end of his employment on January 18.¹

As indicated above, the Board issued a February 6, 2003 Order in which it denied claimant's initial request for preliminary hearing benefits. In that Order, the Board determined claimant had failed to prove that his need for preliminary hearing benefits was related to his work.

The new evidence that claimant presented at the April 2004 preliminary hearing was his copy of the exit interview form that was completed when he was terminated. Claimant's copy of the form established that the comments concerning claimant hurting his back working on his vehicle were added after claimant had signed the form.

In short, claimant has testified how he experienced more intense low back and groin symptoms at work while mopping in early January 2002. And claimant has testified that before the mopping incident he was experiencing ongoing low back symptoms on a consistent basis that required him to miss work five to nine days per month in both November and December 2001. However, the weekend following the mopping incident, claimant worked on his van at a friend's garage and shortly afterwards reported to his maintenance supervisor that the repair work had strained his back.² Furthermore, the medical report from claimant's expert, Dr. Pedro Murati, who attributed claimant's present symptoms to a January 3, 2002 mopping incident, does not reflect the doctor had an accurate history of claimant's symptoms.

Based upon this record, the Board finds no reason to disturb the Judge's conclusion that claimant has failed to prove his present need for medical treatment was related to an accident at work.

The Board is compelled to address the Judge's holding that he could not disturb the Board's preliminary hearing findings as set forth in its February 6, 2003 Order. Preliminary

¹ Claimant's Brief at 6 (filed Apr. 30, 2004).

² Terrill Depo. at 25, 26, 43.

hearing findings are not final but subject to modification upon a full hearing of the claim.³ Also, administrative law judges are not bound by earlier Board preliminary hearing findings when new evidence is presented at a subsequent preliminary hearing. Accordingly, as claimant presented new evidence at the April 2004 hearing, the Judge had the authority to redecide the issue of whether claimant injured his back at work.

Respondent argued the Board did not have jurisdiction to review the April 13, 2004 Preliminary Hearing Order. The Board disagrees. Claimant introduced additional evidence at the second preliminary hearing that addressed the issue of whether claimant injured his back at work. And the Board is specifically empowered to review preliminary hearing findings regarding that issue.⁴

Finally, respondent requested that this preliminary hearing order appeal be assigned to Board Member Duncan A. Whittier. The Workers Compensation Act provides that the Board Members shall decide preliminary hearing appeals on a rotating basis.⁵ Accordingly, respondent's request for Mr. Whittier to decide this appeal is denied. Furthermore, it would be pointless to assign an appeal to a specific Board Member as all five Board Members will decide this claim if there is an appeal from the final order.

WHEREFORE, the Board affirms the April 13, 2004 Preliminary Hearing Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a)(2).

⁴ *Id.*

⁵ K.S.A. 2003 Supp. 44-551(b)(2)(A).